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No. 1129.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

In the Matter of
DIVERSIFIED DEVELOPMENT CORPORATION,
a Corporation,
Debtor.

DIVERSIFIED DEVELOPMENT CORPORATION,
a Corporation, HERMAN WILKENING and
ALICE WILKENING,
Petitioners,

vs.

SECURITY TRUST COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Comes now Security Trust Company, respondent herein, and opposes the petition for a writ of certiorari filed by petitioners Diversified Development Corporation, a corporation, Herman Wilkening and Alice Wilkening.

OPINION BELOW.

Statement in petitioners' brief is correct.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION.

Does the respondent have a provable claim which can be asserted and allowed in a bankruptcy proceeding under Chapter X of the Bankruptcy Act?

CONSTITUTIONAL POINT INVOLVED.

Article 1, Section 8, Clause 4 of the Constitution of the United States of America:

> "The Congress shall have power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

STATUTORY POINTS INVOLVED.

28 United States Code, Section 1334:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of all matters and proceedings in bankruptcy."

Illinois Revised Statutes, Chapter 32, § 157.125 (in part):

> ". . . the failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action at law or suit in equity in any court of this State. . . ."

STATEMENT OF CASE.

The petition is misleading and inaccurate in that:

1. The Illinois State Court did not hold that respondent's claim was invalid. Petitioners' statement that Security had an adverse judgment in the state court "in effect holding void its claim" is inaccurate. The state court did not so hold and the opinions of the reviewing courts of Illinois hereafter cited make it clear that the orders which were entered by the state court cannot be given such effect.

2. The Illinois State Court did not find that respondent had engaged in "the banking business in the State of Illinois." It only found that respondent by making a loan to Diversified "did transact business within the State of Illinois."

3. There has never been a finding by any court that respondent has established a branch office or regional agency in Illinois for the conduct of its banking business nor have petitioners offered any evidence in any proceeding that branch banking is involved in this case in any way.

4. Petitioners suggest that there is a difference in the application of Ill. Rev. Stat., Chap. 32, § 157.125, between foreign commercial and banking corporations but they do not support this suggestion with any decisions or statutes that recognize such a distinction.

5. The petition for reorganization of Diversified Development Corporation was filed by three creditors and the respondent (Appendix, page 5, Cause No. 14648). The petitioners state that respondent joined two creditors in the petition. Further the foregoing creditors were joined by thirteen other creditors who were allowed to intervene in the reorganization proceeding. (Petition for Writ of Certiorari, Appendix page i).

ARGUMENT.

The petition does not comply with the Rules of this court in that it does not refer to any special and important reasons for granting review on writ of certiorari and in fact states no reasons why certiorari should be granted. This court has on two previous occasions, and as recently as October 12, 1964, considered petitions for writ of certiorari involving identical issues as are raised by petitioners herein, and in each instance certiorari was denied. **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952), cert. denied, **Kelley, Glover & Vale v. Kramer**, 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705; **In Re Leeds Homes, Inc.**, 332 F. 2d 648 (6th Cir. 1964), cert. denied, **O. M. Tate, Jr., Trustee, etc. v. National Acceptance Co. of America**, 13 L. ed. 2d 43. The judgments entered by the United States Court of Appeals for the Seventh Circuit are not in conflict with the decisions of another court of appeals, but on the contrary are in accord with the recent decision of the Court of Appeals for the Sixth Circuit, **In Re Leeds Homes, Inc.** Also, the petition requests this court to review the interpretation placed on Illinois statutes on which neither the Illinois or Federal Courts are in disagreement. The petitioners present no new or different questions of law. The Circuit Court of Appeals has not rendered a decision that is in conflict with the applicable decisions of this court.

Under Illinois law a contract made by a foreign corporation not qualified to do business in Illinois although unenforceable in the courts of Illinois, is not void.

Section 157.125 of Chapter 32, Illinois Revised Statutes, applies to a corporation transacting business without a certificate of authority and provides in part:

> "The failure of a foreign corporation to obtain a certificate of authority to transact business in this state **shall not impair the validity of any contract**

> **or act of such corporation,** and shall not prevent such corporation from defending any action at law or suit in equity in any court of this state." (Emphasis added.)

The Illinois Business Corporation Act Annotated, Second Edition, 1947, states, pp. 408, 409:

> "Section 125 was drafted on the following theory: . . . (2) that the acts and contracts of an unlicensed foreign corporation should not be void. . . .
>
> ". . . To meet the second objective, it is provided that the failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation."

The Illinois Legislature intended, as the statute clearly provides, that the contract of a non-qualifying corporation is neither invalid or void. The sole effect of the statute is to make the courts of Illinois unavailable to a non-complying corporation. In **O'Malley v. Bank of Montreal,** 349 Ill. App. 224, 110 N. E. 2d 473, 474, suit was filed by depositors against a **foreign bank** not licensed or authorized to do business in Illinois. The court held that contracts of a **foreign banking corporation** not authorized to do business in Illinois are not void but are simply unenforceable by the corporation in the courts of Illinois.

To the same effect are **Sternberg Dredging Company v. Sternberg's Estate,** 351 Ill. App. 514, 115 N. E. 2d 557, 558 (app. denied 5 Ill. App. 2d v.); **Bradford v. Indiana Harbor Belt R. Co.,** 16 F. 2d 836 (7th Cir. 1927); **Metropolitan Opera Ass'n v. Mertopolitan Opera Ass'n of Chicago, Inc.,** 86 F. Supp. 526, 527 (N. D. Ill. 1949).

Petitioners have undertaken in their brief to attribute different meanings to the words "foreign corporation," as they are used in Ill. Rev. Stats. 1961, Ch. 32, Sec. 157.125, although there is nothing in the statute to indicate that any such difference in meaning was intended by

the Illinois Legislature. At page 12, petitioners argue that the first provision of the statute applies to any "foreign corporation" transacting business in Illinois. Thereafter petitioners argue that "foreign corporation" as used in the latter part of the statute means only commercial corporations and does not apply to foreign banking corporations. There is absolutely nothing in the statute to indicate the Illinois Legislature intended that "foreign corporation" should have such application. Had the Illinois Legislature intended so to do it would have so defined its words. Petitioners would require this court to make such a distinction in order to obtain the forfeiture of respondent's claim which they are seeking in this proceeding.

The Illinois statute and those cases which have construed it make it clear beyond any doubt that the statute does nothing more than declare that a contract made by a non-qualifying foreign corporation is unenforceable in the courts of Illinois. The statute does not make such contract void. The provisions of the statute, moreover, make no distinction between a foreign trading or commercial corporation and a foreign banking corporation. The statute has equal application to both. Diversified contends that its mortgage contract with Security is void, although such contention is opposed to the plain provisions of the statute and to the decisions of the Illinois and Federal courts interpreting it.

Irrespective of the repeated statements of petitioners to the contrary, the only question which the circuit court passed on in the foreclosure and receivership actions in the state court was whether respondent could use the state court to enforce its claim under the mortgage of Diversified which it held. Nothing more was decided, and nothing more could be decided. This is so as petitioners premised their motion to dismiss only on the ground that respondent was an unlicensed foreign corpora-

tion transacting business in Illinois, and for such reason could not enforce its claim under Diversified's mortgage in an Illinois court. In the case of **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952), cert. den. **Kelley, Glover & Vale v. Kramer**, 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705, the District Court (101 F. Supp. 71) found the foreign corporation (an Illinois bank) was doing business in Indiana without a certificate of authority. This was precisely the same contention which Diversified and Wilkening made and which the Circuit Court adopted as they contended that Security, a Missouri corporation, was doing business in Illinois and had not obtained a certificate of authority so to do. In the **In Re V-I-D, Inc.**, case, the District Court and the 7th Circuit Court of Appeals decided, however, that even though an Illinois Bank was doing business in Indiana without a certificate of authority, the petitioning creditors had a provable claim under Chapter X of the Bankruptcy Act. Respondent likewise has a provable claim in the Chapter X reorganization proceeding as the creditors in the **In Re V-I-D, Inc.**, case were found to have had.

The Constitution of the United States gives the Congress the exclusive power to establish bankruptcy laws. Article 1, Section 8, Clause 4.

Pursuant to this authority, Congress has determined that the district courts of the United States shall have original exclusive jurisdiction of all matters and proceedings in bankruptcy. 28 U. S. C., Section 1334.

Chapter II, Section 2, of the Bankruptcy Act (11 U. S. C., Section 11 (a) (1)), establishes the original jurisdiction of district courts and provides in the first paragraph thereof that the principal place of business, or residence, of the debtor shall determine which United States District Court sitting in bankruptcy shall have exclusive jurisdiction. No other bankruptcy court in the United States

could have jurisdiction over the matters presented in this reorganization.

There is no question that respondent loaned the sum of $800,000.00 to petitioner Diversified Development Corporation and that the amount due on said loan, the amount allowed in reorganization proceedings, is $918,799.97. To adopt the position urged by petitioners would result in an unconscionable windfall to the petitioners. The bankruptcy court sits as a court of equity and has the obligation to equitably adjust matters involving the debtor's affairs. Equity demands that petitioners not have the benefit of respondent's money and then avoid the obligation in the only court in which respondent could file its claim.

While the case of **Vanston Bondholders Protective Committee v. Green**, 329 U. S. 156, 67 S. Ct. 237, 91 L. ed. 162, is cited by Diversified, the Supreme Court actually held in that case, that a bankruptcy court does not apply the law of the state in which it sits in determining what claims are allowable and how a debtor's assets shall be distributed. The Supreme Court said at page 162:

> "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another state court . . . But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed and under equitable principles."

In **Prudence Realization Corporation v. Geist**, 316 U. S. 89, 62 S. Ct. 978, 86 L. ed. 1293, the Supreme Court held

that the Bankruptcy Act prescribed its own criteria for distribution to creditors and that Federal and not local law applies to the interpretation and application of Federal statutes. The court said at page 95:

> "The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed . . . and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply Federal law . . ."

In **American Surety Co. v. Sampsell**, 327 U. S. 269, 66 S. Ct. 571, 90 L. ed. 663, cited in **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952, cert. den. 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705) and **In Re Leeds Homes, Inc.**, 332 F. 2d 648, cert. den. 13 L. ed. 2d 43, the court held that certain laborers and materialmen could assert their claims in a bankruptcy court even though their claims could not have been asserted in the California state courts because the claimants had not complied with a state statute which required them to give statutory notice of their claims. The Supreme Court said, page 272:

> ". . . Federal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to its creditors. . . ."

Other cases which hold the allowance of claims in a bankruptcy proceeding is to be decided with reference to the Federal Bankruptcy Act, since such Act is superior to all state laws upon the subject, are **Holmberg v. Armbrecht**, 327 U. S. 392, 66 S. Ct. 582, 90 L. ed. 743; **Moore v. Bay**, 284 U. S. 4, 52 S. Ct. 3, 76 L. ed. 133; **In Re Crosstown Motors, Inc.**, 272 F. 2d 224, 227 (7th Cir. 1959).

Petitioners rely on the case of **Woods v. Interstate Realty Co.**, 337 U. S. 535, 69 S. Ct. 1235, 93 L. ed. 1524. However, they fail to point out to the court that jurisdiction in the **Woods** case was based upon diversity of

citizenship and not bankruptcy. The Sixth Circuit Court of Appeals in its opinion **In re Leeds Homes, Inc.**, 332 F. 2d 648, at page 350 said:

> "The Trustee makes the argument that if the claim would not be enforced in the state court then, under the Erie doctrine, Erie R. R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, it should not be enforced in a federal court sitting in that state. In support of this proposition, the Trustee cites Woods v. Interstate Realty Co., 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524. This argument overlooks the fact that jurisdiction in the instant case is based on federal bankruptcy law and not on diversity of citizenship. Thus a bankruptcy court does not sit 'as if it were only another state court', and Erie does not apply. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 162, 67 S. Ct. 237, 240. Similarly, Woods v. Interstate Realty Co., supra, being a diversity case, has no bearing on this case. In re V-I-D, Inc., 198 F. 2d 392, 396 (C. A. 7), cert. denied, Kelley, Glover & Vale v. Kramer, 344 U. S. 914, 73 S. Ct. 337, 97 L. Ed. 705."

The Seventh Circuit Court of Appeals in the **In Re V-I-D** case, 198 F. 2d 392, said at page 396:

> "The objector here insists that the decision in Woods v. Interstate Realty Co., 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524, is decisive of this question, . . . We think it is clear that the Woods case has no bearing on the question with which we are here confronted . . . It is also true that the decisions of the Mississippi courts held that such a contract was not void but only unenforceable in the courts of that state. There, however, the jurisdiction of the federal court was invoked on grounds of diversity of citizenship. The case, therefore, held, as did Erie Railroad Co. v. Tompkins, that in diversity cases the

federal court could not entertain a suit to which the state had closed its courts. As we have shown in the quotations from the Supreme Court decisions cited above, bankruptcy courts were created by Congress for the purpose of administering bankruptcy matters and are governed by federal law. A bankruptcy court does not sit 'as another state court' and is not governed by state laws. It orders distribution to creditors according to the criteria prescribed by the Bankruptcy Act., 11 U. S. C. A., § 1 et seq."

The petition suggests that respondent was guilty of some impropriety in connection with an injunction which stayed actions pending in the state courts of Illinois. The injunction, however, was mandatory. Section 148 of the Bankruptcy Act (11 U. S. C. 548) provides:

"Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property."

The decisions of this court in **Vanston Bondholders Protective Committee v. Green**, 329 U. S. 156, 67 S. Ct. 237, 91 L. ed. 162; **American Surety Co. v. Sampsell**, 327 U. S. 269, 66 S. Ct. 571, 90 L. ed. 663; **Prudence Realization Corp. v. Geist**, 316 U. S. 89, 62 S. Ct. 978, 86 L. ed. 1293; **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952), cert. denied, **Kelley, Glover & Vale v. Kramer**, 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705; and **In Re Leeds Homes, Inc.**, 332 F. 2d 648 (6th Cir. 1964), cert. denied, **O. M. Tate, Jr., Trustee, etc. v. National Acceptance Co. of America**, 13 L. ed. 2d 43, are controlling in this proceeding.

There is no compelling reason why this court should grant certiorari when the question involved has been

settled by prior decisions of this Court in refusing to review the correct decisions of the Sixth and Seventh Circuit Courts of Appeal.

CONCLUSION.

As the exclusive jurisdiction of bankruptcy matters is given to the district courts of the United States and as the law of the State of Illinois does not invalidate respondent's claim, the decisions of the District Court and the Circuit Court of Appeals are correct. Respondent respectfully submits that the petition does not meet this court's standards for review on a writ of certiorari and prays that this Honorable Court deny said petition.

Respectfully submitted,

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